

NO. 45077-1-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TROY RICHARD AKIN,

Appellant.

BRIEF OF RESPONDENT

**JASON LAURINE
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Deputy Prosecutor
for Respondent**

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I. ISSUES

1. Was the appellant denied his right to participate in his defense when the trial court in exercise of its inherent abilities to control the courtroom instructed him to not react demonstratively during voir dire?
2. Was the appellant's right to confront an adverse witness violated when a video of his failure to appear in court was played at trial?
3. Was the appellant denied effective assistance of counsel because his attorney had a potential conflict of interest?
4. Should the appellant's conviction be overturned when the instruction that defined bail jumping contained all the essential elements of the crime as defined by statute but did not include the degree element included in the to convict instruction?

II. ANSWERS

1. No. A trial judge is permitted to use its inherent abilities to control the decorum within the courtroom, and in so doing the trial judge did not remove the appellant from his trial nor did the trial judge prevent the defendant from assisting his attorney when it instructed the appellant to not react during voir dire.
2. No. The video did not contain testimonial evidence, and even if it did the entry of that evidence withstands constitutional harmless error analysis because, excluding the video, the evidence against the appellant overwhelmingly in favor of guilt beyond a reasonable doubt.
3. No. A theoretical and potential conflict is not sufficient to show an actual conflict affected defense counsel's representation of the

appellant when defense counsel did not have competing loyalties and provided a reasonable defense.

4. No. Only to convict instructions require every element of the crime to be enumerated.

III. FACTS

On December 11, 2012, the appellant was seen on first appearance by Cowlitz County Superior Court after his arrest on suspicion of committing theft in the second degree. He was admitted to \$25,000 bail and was ordered to appear on December 18, 2012. The appellant appeared on December 18, 2012, his bail was reduced to \$5,000, and he was ordered to appear on three further dates.

A pre-trial was held on March 4, 2013. The appellant was present and was ordered to appear on April 4, 2013 for a readiness hearing. The appellant failed to appear on April 4, 2013, and a warrant was issued for his arrest. The State amended the original charging document to add the charge of bail jumping.

The case went to trial on May 23, 2013. Prior to voir dire the trial judge admonished the appellant, and instructed him not to have contact with any jurors and to avoid any reactions to anything within the

proceedings. RP 3. The appellant remained throughout trial and testified in his defense.

The State called one witness, Angela Benneman. RP 26-36. Ms. Benneman was a court clerk for Cowlitz County Superior court and was the clerk present on two of the dates at issue in the case against the appellant. The State entered into evidence six exhibits, two videos (Exhibits 1 and 2) and four separate clerk's minutes (exhibits 3-6). Ms. Benneman testified to each item as both an eye witness and as a custodian of record.

She testified to the authenticity of the minutes and the content contained within them. RP 28-31. She also testified that the appellant had been admitted to bail and did not appear in court on April 4, 2013, as ordered to do on March 4, 2013. RP 32. She then testified that the appellant had been charged with Theft in the second degree. RP 29. The State played two videos. The first video was of the hearing on March 4, 2013, where the appellant was ordered to appear on April 4, 2013. The second video was of the April 4, 2013 hearing where the appellant failed to appear.

The appellant testified in his defense. RP 57-52. He agreed that he had been admitted to bail and on March 4, 2013, was ordered to appear in

court on April 4, 2013, but failed to do so. RP 59, 61-62. He claimed he made a mistake with work and took the wrong day off, but never one suggested he was in the courthouse on April 4, 2013. RP 60. He then claimed he was confused. RP 61.

After the jury instructions were read to the jury, the State advised the court of an issue involving the appellant. RP 83-84. The appellant made a demonstrative showing of his displeasure with the proceedings against him. The State informed the court in order to ensure the appellant's right to fair trial was protected. RP 84. At the State's urging, the court again admonished the appellant that he was required to keep his reactions to himself and sit quietly. RP 84.

IV. ARGUMENT

1. WHEN THE TRIAL COURT EXERCISED ITS INHERENT ABILITIES TO CONTROL THE COURTROOM IT DID NOT PREVENT THE APPELLANT FROM PARTICIPATING IN HIS DEFENSE.

Whether an appellant's constitutional right to be present has been violated is a question of law and is reviewed de novo. *State v. Strode*, 167 Wash.2d 222, 225, 217 P.3d 310 (2009).

A criminal defendant has a fundamental right to be present at all critical stages of a trial. *State v. Irby*, 170 Wash.2d, 874, 880, 246 P.3d 796 (2011). Jury selection is a critical stage of a criminal proceeding. *Gomez v United States*, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989). Indeed, a defendant's due process right to be present at critical stages extends to voir dire. *State v. Wilson*, 141 Wash.App. 597, 604, 171 P.3d 501 (2007).

The record does not show, nor does it even suggest, that appellant was not present during voir dire. Appellant was present during all critical stages of the trial and proceedings leading up to the trial, excluding one and that is the subject of the charge for which he was found guilty. He was admonished to keep his comments and his reactions to himself, but never excluded from participating in the selection of his jury. It is a broad and reckless leap to suggest that court controlling the reactions of individuals within the courtroom in order to ensure that as open of a conversation as possible can take place during voir dire prevented him from participating.

Appellant suggests *Irby*, controls his case. In *Irby*, prior to voir dire and empanelling a jury, the trial court sent out an email to defense counsel and the state that proposed several jurors should be excused. The defendant was not involved in the email conversation. The Supreme Court

held that under both the due process clause of the Fourteenth Amendment and Article I, Section 22, the defendant's right to be present was violated and was not harmless error. 170 Wash.2d at 885-887, 246 P.3d 796.

Unlike, *Irby*, the appellant was present at all stages of the trial and was present as jury selection took place. Here, the court merely exercised its inherent right to control the courtroom. Trial judges may maintain firm control of their courtrooms. *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wash.2d 127, 140, 606 P.2d 1214 (1980). Directing a defendant on how to conduct himself within the courtroom is within the general discretionary powers of the court exercised during trial in aid of promoting orderly presentation of the case. *State v. Johnson*, 77 Wash.2d 423, 428, 462 P.2d 933 (1969). Appellant has failed to show how an admonishment to keep his reactions under control prevented his presence during this critical stage of his trial when indeed he was there. He also failed to show how that admonishment prevented him from assisting in his defense. Consequently, Akin has failed to show any error occurred.

2. THE APPELLANT'S RIGHT TO CONFRONTATION WAS NOT VIOLATED.

The Sixth Amendment affords a defendant the right to confront witnesses against him. The right applies to witnesses or those who bear

testimony against an accused. Testimony is a solemn declaration or affirmation made for the purpose of establishing or proving some fact. *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Under *Crawford*, a witness's testimony against a defendant is inadmissible unless the witness appears at trial or, if unavailable, the defendant had a prior opportunity for cross examination. 541 U.S. at 54, S.Ct 1354. The court in *Crawford* failed to provide a comprehensive definition of "testimonial" but did suggest that "testimonial statements" are those made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. 541 U.S. at 52, 124 S.Ct. 1354.

In the current case, Akin argues that a statement made by his defense counsel during the time he was alleged to have failed to appear is testimonial and violates his right to confrontation. During trial, the State played a video of hearing where Akin failed to appear. The court clerk who was present at that hearing and who took the minutes for that hearing testified that Akin failed to appear. Ms. Benneman testified that the defendant failed to appear on April 4, 2013, that the trial was struck, and that a bench warrant was issued. This is what happened on the video.

However, during the hearing, defense counsel stated “I represent the defendant, but I cannot represent his whereabouts.” (Exhibit 2, CR 36).

Ultimately, the appellant failed to object to the admission of the video at trial, rather he stipulated to its admission, and thus did not preserve this error for appeal. RAP 2.5(a). The appellant argues that this issue is of constitutional magnitude, and is thus reviewable under RAP 2.5(a)(3) as a “manifest error.” However, the Supreme Court has repeatedly stated “[t]he exception actually is a narrow one, affording review only of ‘certain constitutional questions.’” *State v. Kirkman*, 159 Wash.2d 918, 934-35, 155 P.3d 125 (2007), *citing State v. Scott*, 110 Wash.2d 682, 687, 757 P.2d 492 (1998). Only an “explicit or almost explicit” opinion of the defendant’s guilt can constitute manifest error. *Kirkman*, 159 Wash.2d at 935.

In *State v. Haq*, 166 Wash.App. 221, 268 P.3d 997 (2012), the Court found that testimony by police officers in a multiple murder case that the defendant was “an active shooter who was hunting for people” and that a victim “had been executed” did not meet this standard. The statement in the video played in this case falls far short of the testimony in *Haq*, which itself did not meet the *Kirkman* threshold for manifest error. Plainly, the statement made in the video does not qualify as an “explicit or

almost explicit” opinion on the appellant’s guilt, and the appellant is thus barred from raising this issue for the first time on appeal.

Finally, for the appellant to raise this issue for the first time on appeal as “manifest error” he must show actual prejudice, and that the error and practical and identifiable consequences in the trial of the case. *State v. O’Hara*, 167 Wash.2d 91, 99-100, 217 P3d 756 (2009), *citing Kirkman*, 159 Wash.2d at 935. This was not done. Overwhelming evidence was introduced at trial to show that the defendant was admitted to bail, ordered to appear in court on a specific date, and failed to appear as ordered.

Confrontation clause errors are subject to harmless-error analysis. Under this standard, the State must show “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *State v. Jasper*, 174 Wash.2d 96, 117, 271 P.3d 876 (2012). Whether such an error is harmless depends upon a number of factors, including, but not exclusive to, the importance of the testimony to the State’s case, the presence of corroborating testimony on the material points, and overall strength of the State’s case. *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *Jasper*, 174 Wash.2d at 117, 271 P.3d 876.

Here, the State did not rely upon the defense counsel's supposed testimonial statement. Rather, the State solely relied upon the testimony of the court clerk, Anglea Benneman, who was present at two of the hearings involving the appellant. She is a custodian of records for the Superior Court of Cowlitz County. On March 4, 2013, the appellant was ordered to appear in court for a readiness hearing on April 4, 2013. The appellant did not appear on April 4, 2013, and a warrant was issued for his arrest. CR: 35-36.

The appellant testified, and admitted he was out on bail and failed to appear in court on April 4, 2013, as he had been ordered to by the court to do. The defendant had been charged with theft in the second degree. CP: 62. On March 4, 2013, he was ordered to appear in court on April 4, 2013. CP: 61. And he failed to appear as ordered even though he knew he had to appear. CP 62.

This is the evidence the State relied upon to convict the appellant of one count of bail jumping. The evidence itself is overwhelmingly in favor of guilt and shows, beyond a reasonable doubt, that the appellant is guilty of bail jumping. Consequently, whether or not the statement may have offended Confrontation Clause, its admission had no effect on the outcome of the verdict and, therefore, its admission was harmless error.

3. WHILE APPELLANT SUGGESTS A POTENTIAL CONFLICT HE HAS FAILED TO SHOW AN ACTUAL CONFLICT THAT AFFECTED DEFENSE COUNSEL'S REPRESENTATION.

The Sixth and Fourteenth Amendments provide any criminal defendant the right to effective assistance of counsel at trial. This includes representation that is free from conflicts of interest. *Holloway v. Arkansas*, 435 U.S. 475, 481, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Any potential conflict under the ethical rules is a question of law and will be reviewed de novo. *State v. Vicuna*, 119 Wash.App. 26, 30-31, 79 P.3d 1 (2003).

Appellant claims a conflict of interest existed when the State played a video of the readiness hearing at which he failed to appear. Among other statements made within the video, defense counsel stated "I represent the defendant, but I cannot represent his whereabouts." Defense counsel was not a State's witness, nor was this statement referred to during the trial. Instead, the court clerk present at the hearing was the State's witness, and she testified to the fact the defendant did not appear at that hearing and did not appear until the following week. At trial, defense counsel was permitted to inquire about the actions taken by the appellant

once he determined a warrant had been issued for his arrest, but the appellant still admitted to his failure to appear as instructed. RP 61.

Here, appellant brings up the issue of any potential conflict for the first time on appeal. Reversal of a conviction is required if a defendant or his attorney made a timely objection to a claimed conflict and the trial court failed to conduct an adequate inquiry. *Holloway*, 435 U.S. at 488, 98 S.Ct. 1173. However, in order to establish a violation of his Sixth Amendment rights, an appellant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his trial counsel's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348-50, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980); *State v. Payton*, 29 Wash.App. 701, 717, 630 P.2d 1362 (1981). This does not mean appellant must show actual prejudice, but that his counsel actively represented conflicting interests at trial. *Cuyler*, 446 U.S. at 350, 100 S.Ct. at 1179; *Payton*, 29 Wash.App. at 717.

The mere possibility of conflict is insufficient to impugn a criminal conviction. *Cuyler*, 446 U.S. at 350. An actual conflict exists only if the claimed conflict affected counsel's performance, which occurs only when the interest of both the defendant and the attorney diverge with respect to a material factual or legal issue or to the course of action. *United States v.*

Baker, 256 F.3d 855, 860 (9th Cir.2001). Appellant has failed to make such a showing.

In order to show an adverse effect, the appellant must show that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests. *United States v. Santini*, 85 F.3d 9, 16 (2nd Cir.1993). The conflict must cause a lapse in representation contrary to the defendant's interests. *State v. Robinson*, 79 Wash.App. 386, 395, 902 P.2d 652 (1995), or have likely affected particular aspects of counsel's advocacy on behalf of the defendant. *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir.1992).

Here, the appellant presented a defense to the jury--he argued that he was confused about the dates, not that he was in the bathroom of the courthouse or that he was in a completely different courtroom. Instead, he stated he thought the date was April 3, 2013, not April 4, 2013. Had the appellant only been in a different courtroom or perhaps in a bathroom within the courthouse, it is likely he would have shown up on April 4, 2013, at some point. But this potential theory overlooks his trial testimony. As he stated in his own testimony, he was working and not in the

courthouse. He admitted in both direct and cross examination that he did not appear in court that day and that he knew he had been instructed to do so. Consequently, the appellant has failed to show a plausible alternative defense that should have been pursued but was not.

4. THE “TO CONVICT” INSTRUCTION CONTAINED EVERY ELEMENT OF THE CRIME AND PERMITTED BOTH COUNSEL TO ARGUE THE CASE.

Appellant next contends that his conviction should be reversed because the definition instruction for bail jumping did not include the language that he had been charged with theft in the Second degree, as was included in the to convict instruction. This is a definitional issue and not an issue of omission of essential elements.

RAP 2.5(a) generally does not allow parties to raise claims for the first time on appeal. *State v. Robinson*, 171 Wash.2d 292, 304, 253 P.3d 84 (2011). RAP 2.5(a)(3), however, allows appellants to raise claims for the first time on appeal if such claims constitute manifest error affecting a constitutional right.

A claim of error is of constitutional magnitude under RAP 2.5(a)(3) when the claim, if correct, implicates a constitutional interest as compared to another form of trial error. *State v. O'Hara*, 167 Wash.2d 91,

98, 217 P.3d 756 (2009). An alleged error is manifest if it results in actual prejudice; that is, if it had “practical and identifiable consequences” at trial. *State v. Gordon*, 172 Wash.2d 671, 676, 260 P.3d 884 (2011) *quoting O'Hara*, 167 Wash.2d at 99, 217 P.3d 756.

“To convict” instructions must include every element of the crime charged. *State v. Fisher*, 165 Wn.2d 727, 753, 202 P.3d 937 (2009). Failure to include every element is constitutional error that may be raised for the first time on appeal. *Fisher*, 165 Wn.2d at 753.

Jury instructions are sufficient if they allow counsel to argue their theories of the case, are not misleading, and, when read as a whole, properly inform the jury of the applicable law. *State v. Aguirre*, 168 Wash.2d 350, 363–64, 229 P.3d 669 (2010). Even if an instruction may be misleading, it will not be reversed unless prejudice is shown by the complaining party. *Keller v. City of Spokane*, 146 Wash.2d 237, 249, 44 P.3d 845 (2002).

A “to-convict” instruction must contain all of the elements of the crime charged because “‘it serves as a yardstick by which the jury measures the evidence to determine guilt or innocence.’ ” *State v. Lorenz*, 152 Wash.2d 22, 31, 93 P.3d 133 (2004) *quoting State v. DeRyke*, 149 Wash.2d 906, 910, 73 P.3d 1000 (2003)). “Omission of an element

relieves the State of its burden to prove every essential element beyond a reasonable doubt.” *Lorenz*, 152 Wash.2d at 31, 93 P.3d 133 (citing *State v. Smith*, 131 Wash.2d 258, 265, 930 P.2d 917 (1997)).

Here, the “to convict” instruction contained every element necessary to convict the appellant of bail jumping on a felony, specifically, theft in the second degree. Consequently, he has not raised an issue of constitutional magnitude nor has he shown that the error was manifest.

However, the appellant also complains that the definitional instruction for bail jumping was misleading because it did not contain information regarding the crime he had been charged with. His argument fails because the definition of bail jumping does not require an actual crime be charged. RCW 9A.76.170(1) indicates that the crime of bail jumping occurs when:

“Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required.”

This is the same language of the definition of bail jumping provided to the jury in appellant’s case. It correctly stated the definition

and did not prevent him to properly argue his case before the jury. Consequently, the definition instruction provided by the court to the jury was correct and not misleading and permitted both counsel to argue their theory of the case.

V. CONCLUSION

For the above reasons, the State respectfully requests the Court to uphold the appellant's conviction for bail jumping.

Respectfully submitted this 2 day of January, 2014.

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on January ^{2nd}2, 2014.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

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